No. 92-166

In The

Supreme Court of the United States

October Term, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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I. INTEREST OF THE AMICUS CURIAE.

The State of Hawaii has a deep and abiding interest in the proper functioning of the jurisdictional grants and judge-made rules which permit suits against the United States and its officers for wrongful actions by the Government. Presently, the State of Hawaii is evaluating a number of very large claims it has against the United States, ranging in possible valuation of up to the hundreds of millions of dollars or more, for actions by the Government which have deprived the people of Hawaii of assets transferred to them by the Congress, and wrongfully used by the United States, including but not limited

to claims pertaining to the Government's wrongful assertion of title over and takings with respect to lands set aside under the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921). *See, e.g., State of Hawaii ex rel. Attorney General v. United States*, 866 F.2d 313 (9th Cir. 1989). The decision of the Federal Circuit, sitting *en banc*, in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), poses a grave threat to these interests, as it does to the interests of all parties, including States, who have claims against the United States or its officers. By rigidly enforcing 28 U.S.C. § 1500 (1988) as an election clause, the Federal Circuit has threatened to arbitrarily terminate large numbers of claims against the Government based on factors, such as court delays and docket congestion over which litigants have no control whatsoever, in a manner that renders the entire corpus of federal jurisdiction-conferring statutes and doctrines amenable to substantial constitutional attack. In so doing, Hawaii believes, the Federal Circuit has overlooked a central tenet of statutory interpretation – that which mandates reading a federal law to avoid a substantial constitutional question. In contrast to the judgment of the *en banc* Federal Circuit, Hawaii submits that § 1500 should be read to permit the equitable tolling of claims that could be filed in the Claims Court during such time as a litigant against the Government is pursuing non-Claims Court remedies. Under this construction, litigants against the government would of course be subject to all the rules of res judicata and collateral estoppel, and a judgment on the merits of a non-Claims Court claim would generally operate to preclude any Claims Court suit on the same subject matter. However, where, as is often the case, the

non-Claims Court forum turns out to be without jurisdiction, the rule Hawaii urges would allow the Claims Court suit to proceed. This result, further, is consistent with the rule in *Casman v. United States*, 135 Ct. Cl. 647 (1956), which was overruled by the Federal Circuit in the opinion and judgment under review.

ARGUMENT

In Construing 28 U.S.C. § 1500 Rigidly, the Federal Circuit Has Infected the Entire Jurisdictional Scheme for Suits Against the Government with Substantial Constitutional Doubt; To Alleviate this Doubt, the Court Should Interpret § 1500 So as to Permit Exhaustion of Non-Claims Court Remedies Without Forfeiture of Claims under the Tucker Act.

The decision of the Federal Circuit in this case has two significant effects on litigants against the Government. Those litigants with plausible claims both in the Claims Court and in other federal fora must, if a Claims Court suit is filed first, be sure that that suit is pressed to conclusion and any jurisdictional bar uncovered prior to the running of any statute of limitations upon non-Claims Court claims. Conversely, such litigants who file first in District Court must be sure that such a suit is pressed to conclusion or determination of a jurisdictional bar before the running of the limitations period in the Claims Court. The central feature of the rule of decision as announced by the Federal Circuit, of course, is the fact that claims in the Claims Court or the District Court will be subject to forfeiture not necessarily on the basis of any action of the

litigant, but on the basis of factors wholly beyond that litigant's control, including court congestion, or, as not-too-uncommonly occurs, delay by the Government in raising jurisdictional matters. *See* Fed. R. Civ. P. 12(h)(3). These wholly random forfeitures plainly run afoul of the teachings of this Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); at the very least, they raise a substantial constitutional issue that warrants reading § 1500 less rigidly than the court below. Indeed, whether or not the *Logan* defect in the Federal Circuit's reading of § 1500 was raised below, the notion that federal laws will not be read to inject a substantial federal constitutional doubt into them is "beyond debate." *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court, in light of the irrational manner in which the Federal Circuit's view of § 1500 operates, should reject that interpretation in favor of one which still pays heed to the statutory language, but yet avoids the constitutional issue.

The most consistent and readily available method of doing so is to rely on the generous notion of "equitable tolling" that Chief Judge Nies adopted in her concurring opinion. *See* Pet. App. A-27 (Nies, C.J., concurring, citing *Irwin v. Veterans Admn.*, 111 S. Ct. 453 (1990)). By tolling the statutes of limitation during such periods as non-Claims Court suits are pending, the Court would preclude both the simultaneous suits which the Government protests were the target of § 1500, and the random lapsing of claims for reasons over which litigants have no control. Alternatively, the Court can, and should. adopt the "claim-limiting" approach in *Casman v. United States*, 135 Ct. Cl. 647 (1956), which was the law for nearly four

decades before the precipitous action of the Federal Circuit below.

Contrary to the Federal Circuit's reasoning, the ruling below is not compelled by the statutory language. Indeed, given the elimination of the "No person shall file or prosecute" language from the 1948 revision of the statutes at large, the ruling is directly contrary to the language of § 1500, read in context of its history and purpose. *See* Pet. App. A-6 - A-10. That purpose plainly was to prohibit litigants from prosecuting the merits of two identical or substantially related lawsuits against the Government at the same time. But the notion that a federal court may not *decide* a federal claim which a litigant has a right to *file* is not unheard of in the law. *See Deakins v. Monoghan*, 488 U.S. 193 (1988) (claims for damages in suits otherwise barred by *Younger v. Harris*, 401 U.S. 37 (1971), are to be stayed, not dismissed, to avoid irrational running of the statutes of limitation). A rule of equitable tolling, or, as in *Deakins*, one which reads the term "jurisdiction" as relating to the power to decide the merits (not the power to accept a filing), gives 28 U.S.C. § 1500 all of the weight it deserves.

CONCLUSION

The judgment of the Federal Circuit should be reversed or vacated and remanded in accordance with the foregoing arguments.

Dated: Honolulu, Hawaii, December 3, 1992.

Respectfully submitted,

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